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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEAMSHIP CLERKS UNION, LOCAL 1066,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS F. BIRMINGHAM
CHRISTOPHER N. SOURIS
Counsel of Record
FEINBERG, CHARNAS & BIRMINGHAM
177 Milk Street
Boston, MA 02109
(617) 338-1976

Attorneys for Petitioner
Steamship Clerks Union, Local 1066

May 25, 1995

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QUESTION PRESENTED

Whether the court of appeals violated principles of causation established in Watson v. Forth Worth Bank & Trust, 487 U.S. 977 (1988) and Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989) for disparate impact cases under Title VII of the Civil Rights Act of 1964 by concluding that the EEOC established a prima facie case that the Union caused the exclusion of minorities from its membership despite the absence of a charging party alleging exclusion, and despite the complete absence of any other evidence that a single minority had been excluded from or had even applied for membership.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

STEAMSHIP CLERKS UNION, LOCAL 1066,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Steamship Clerks Union, Local 1066 (the Union) respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this proceeding to the extent the court of appeals affirmed the judgment of the United States District Court for the District of Massachusetts.[1]

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[1] Aside from the parties named in the caption, Bernard S. Costello, Inc. was a defendant in the case in the district court but was defunct before judgment was entered, did not file an opposition to the EEOC's motion for summary judgment, and did not appeal from the district court's judgment against it.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 48 F.3d 594. The memorandum of decision entered by the district court (App. 36) is reported at 850 F. Supp. 74.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case concerns the proper application of Title VII of the Civil Rights Act of 1964, 29 U.S.C. §2000e, et seq. Pertinent statutory provisions are reprinted in the Appendix to this petition. (App. 49).

STATEMENT OF THE CASE

This case concerns the composition of the membership of a small local union in a declining industry on Boston's waterfront. The EEOC brought this discrimination action under Title VII of the Civil Rights Act of 1964 based on an institutional charge -- no minority had filed a charge alleging that he or she had been rejected for membership or had been discouraged from applying for membership in the Union. With approximately 80 active members, the Union's membership is all white and, during the period in question (1980-1986), the

Union admitted 30 new members all of whom were white and relatives of other members. (App. 4). Based on no other evidence, the court of appeals concluded that the EEOC had established a prima facie case that the Union's requirement that new applicants be sponsored by Union members caused the exclusion of minorities from the Union's membership, and affirmed the district court's grant of summary judgment to the EEOC under a disparate impact theory. The court of appeals likewise affirmed the district court's denial of the Union's cross-motion for summary judgment.[2]

While the court of appeals affirmed the district court's ruling on liability, it vacated the district court's remedial order, which had been entered without giving the parties proper notice and an opportunity to be heard, and remanded the action to the district court for full consideration of an appropriate remedy. The court of appeals denied a petition by the Union to stay issuance of the mandate pending the filing of a petition to this Court for a writ of certiorari.

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[2] The court of appeals' assertion that the Union "formally adopted the membership sponsorship policy" on October 1, 1980 (App. 3) is inexplicable, as the Union did no such thing and the record does not establish otherwise. The record will reflect that the "policy" was simply a matter of long-standing tradition.

REASONS FOR GRANTING THE WRIT

The court of appeals' conclusion that the EEOC had established a prima facie case that the Union caused the exclusion of minorities from its membership in violation of Title VII of the Civil Rights Act of 1964 under a disparate impact theory despite the absence of an individual plaintiff or charging party alleging exclusion and despite the complete absence of any other evidence that a single minority had been rejected or had even applied or considered applying for membership in this small union violates this Court's commandments in Wards Cove Packing Co., Inc. v. Antonio 490 U.S. 642 (1989) and Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) regarding proof of the element of causation in a plaintiff's prima facie case of disparate impact under Title VII. Moreover, the court of appeals' decision conflicts with the decisions of other courts of appeals, and presents important issues regarding a plaintiff's prima facie case under a disparate impact theory.

I. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND OTHER CIRCUITS ON THE ELEMENT OF CAUSATION IN A PLAINTIFF'S PRIMA FACIE CASE OF DISPARATE IMPACT UNDER TITLE VII

The Court in Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642 (1989) and Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) articulated clear rules governing the element of causation in a plaintiff's disparate impact claim under Title VII of the Civil Rights Act of 1964:

> [A] Title VII plaintiff does not make a case of disparate impact simply by showing that, "at the bottom line," there is a racial imbalance in the work force.

Wards Cove, 490 U.S. at 657 (emphasis in original). The Court emphasized that a racial imbalance "alone will not suffice to make out a prima facie case of disparate impact." Id. (emphasis in original).

In addition to showing a racial imbalance, "causation must be proved." Watson, 487 U.S. at 994. To establish a prima facie case of causation, a plaintiff must (1) "identify[] the specific employment practices that are allegedly responsible for any observed statistical disparities" in the composition of the work force and (2) "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants" from protected groups. Watson, 487 U.S. at 994 (emphasis added); see also Wards Cove, 490 U.S. at 656-57.[3]

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[3] While overturning other aspects of the Court's decision in Wards Cove, Congress actually codified the Court's ruling on causation in the Civil Rights Act of 1991. 29 U.S.C. §2000e-2(k). (App. 51-52).

While the EEOC here purported to offer evidence of a significant racial imbalance in the Union's membership and identified the Union practice allegedly responsible for the disparity, it failed to offer any other evidence to show that the practice in question "caused the exclusion of applicants." Watson, 487 U.S. at 994. Indeed, the district court actually found that "no black or Hispanic has eve[r] been formally denied admission to Local 1066." (App. 40). While the district court did not explain its use of the qualifying term "formally," it made no finding that any blacks or Hispanics were ever denied admission to Local 1066 in any manner, formally or otherwise.

Moreover, the EEOC proceeded in this case on the basis of an institutional charge without any charging party who had alleged exclusion. The EEOC likewise offered no applicant data showing the rejection of any minorities and no witnesses claiming they were rejected for membership or even deterred from applying. In fact, there is no record evidence whatever that any minorities ever applied, inquired about applying or even considered applying to this small local union during the relevant time (or any other time). Consequently, to the extent the district court even addressed the issue, it could only go so far as to say that "[c]hance is not a likely explanation" for the

racial composition of the Union's membership (App. 42-43) -- a finding that in no way satisfies this Court's standard for establishing causation.[4]

Thus, the Court in Watson and Wards Cove imposed a burden of proof on plaintiffs to produce significant, affirmative evidence of exclusion in order to establish causation. In Waston, the Court held that a plaintiff must "offer statistical evidence" of exclusion and noted:

> Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise an inference of causation.

487 U.S. at 994-95. The Court then pointedly cited and quoted from a series of cases in which plaintiffs presented not only evidence that minority applicants were actually disqualified or rejected, but evidence that minorities were disqualified or rejected at "substantially higher rates" or in "substantially disproportionate numbers" compared to whites. Id. at 995.

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[4] To the extent the court of appeals went further to conclude that the Union's sponsorship practice had excluded minorities from membership, the court impermissibly engaged in its own factfinding. See Icicle Seafoods v. Worthington, 475 U.S. 709 (1986).

Accordingly, in order to establish a prima facie case of disparate impact under Watson and Wards Cove, a Title VII plaintiff must offer evidence that a statistically significant number of minorities were denied employment or admission. The record in this case, however, is completely devoid of evidence that a single minority was ever denied admission, either formally or informally, or was even discouraged from applying for membership in the Union.

The court of appeals primarily relied on Dothard v. Rawlinson, 433 U.S. 321 (1977) to justify its conclusion that the EEOC had established a prima facie case of causation despite the total absence of complainants or other evidence of exclusion. However, in Dothard, the Court was confronted with at least one applicant, namely the plaintiff herself, who had alleged exclusion -- evidence that the EEOC could not even muster here. Moreover, in Dothard, the Court found that a potential female applicant could "easily" determine that her own weight and height would make an employment application futile where the district court had found that the employer's specific, objective weight and height requirements "would exclude 41.13%" of the female population while excluding less than 1% of the male population." 433 U.S. at 329-30. There is no similar evidentiary basis at all in this case upon which to conclude that a potential minority applicant could easily or otherwise determine based on some objective criteria or facts that he or she would be unable to obtain a sponsor for membership in this Union.

In the only other case cited by the court of appeals excusing a plaintiff's failure to provide evidence of applicant data (App. 22), the plaintiff, unlike the EEOC here, presented direct evidence of an awareness among members of the potential applicant pool about the union's well-established, racially exclusionary policies and practices -- evidence that is, again, altogether lacking in this case. See United States v. Sheetmetal Workers Ass'n. Local 36, 416 F.2d 123, 132 (8th Cir. 1969)("the record does show...that [minorities] were acutely aware of the Local's [blatant racially exclusionary] policies").

The court of appeals' citation of United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. denied, 404 U.S. 984 (1971) for the proposition that a disparity between the racial composition of a union's membership and the area work force "raises an inference that the racial imbalance is the result of discrimination" (App. 19) only confirms the court of appeals' complete misapprehension of Watson and Wards Cove, two cases in which the Court squarely repudiated the notion that a racial imbalance alone can establish causation. Wards Cove, 490 U.S. at 657.

At bottom, the court of appeals' conclusion that the EEOC had presented a prima facie case of causation in this case rests on the court's extraordinary insinuation that the sponsorship practice has an "inherently obvious tendency to discriminate against protected classes of individuals." (App. 21 n.12)(emphasis added). However, the court elsewhere

conceded both that the practice is "neutral on its face" (App. 26), and that its conclusion that a sponsorship practice caused the exclusion of minorities was unprecedented. (App. 24 n.13).

If the membership sponsorship practice is "neutral on its face," as even the court of appeals concedes, the EEOC consequently must produce some other evidence to establish a prima facie case that the practice is actually discriminatory in its application. The only "other" evidence here is that, "'at the bottom line,' there is a racial imbalance" in the membership of the Union -- evidence that the Court has unmistakably held "will not suffice to make out a prima facie case of disparate impact." Wards Cove, 490 U.S. at 657 (emphases in original).[5]

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[5] The court of appeals' observation that the sponsorship practice "appeared to operate nepotistically" (App. 23)(emphasis added) is not a finding, is not supported by findings by the district court, and suffers from precisely the same flawed analysis the appeals court applied to the issue of the exclusion of minorities. As the Ninth Circuit held in Wards Cove following remand, "nepotism exists when relatives are preferred because of their relationship." Antonio v. Wards Cove Packing Co., Inc., 10 F.2d 1485, 1500 (9th Cir.)(emphasis added), cert. denied, 1994 U.S. Lexis 5439 (1993). By definition, no determination of "preference" can be made without evidence that those the Union admitted were given some type of advantage over others who were not admitted -- evidence that is altogether lacking in this case. Id.

The court of appeals' conclusion that the EEOC established causation thus appears to be based on nothing but an assumption that white members of this Union will not sponsor blacks for membership. Whatever the logic of that assumption may be, but see Local 36, 416 F.2d at 135 (union's sponsorship requirement in practice was "routinely fulfilled by members of the executive board"), it has no evidentiary basis whatever in this record. To establish causation, this Court requires a plaintiff to provide evidence, not mere speculation, that the application of a particular practice of a particular employer or union has actually excluded minorities from its work force or membership. Wards Cove, 490 U.S. at 656-57; Watson, 47 U.S. at 994-95; see also Fudge v. Providence Fire Department, 766 F.2d 650, 656 (1st Cir. 1985)("only evidence," rather than "logic alone," can sustain assumptions about the discriminatory consequences of facially neutral employment practices); Local 36, 416 F.2d at 135 (court refused to assume that white members of a union that had discriminated against blacks in the past will not vote to admit blacks to membership).

Lacking any evidence of rejections of or even applications by minorities and without even a single complaining charging party, the EEOC with the sanction of the lower courts in this case has simply branded this Union as having excluded minorities from membership in violation of Title VII of the Civil Rights Act of 1964. Such a conclusion is forbidden by the Court's decisions in Watson and Wards Cove.

Finally, the court of appeals' decision here conflicts at least in principle with decisions of several other circuits. See, e.g., Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1367-70 (5th Cir. 1992), cert. denied, 114 S.Ct 1641 (1994); Gilty v. Oak Park, 919 F.2d 1247, 1254 (7th Cir. 1990); Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 159-60 (2d Cir.), cert. denied, 502 U.S. 880 (1991); Walls v. Petersburg, 895 F.2d 188 (4th Cir. 1990). Unlike the court of appeals here, the courts in each of these cases required plaintiffs to present evidence that the challenged employment practice actually excluded minorities from employment or promotion, even in cases where there were no minorities at all in the subject positions.

II. THE PETITION PRESENTS IMPORTANT ISSUES REGARDING THE ELEMENT OF CAUSATION IN A PLAINTIFF'S PRIMA FACIE CASE OF DISPARATE IMPACT UNDER TITLE VII

The Court established strict standards of proof of causation in disparate impact cases under Title VII in order to eliminate the possibility that defendants could be held liable for what the Court recognized as a multitude of innocent, non-discriminatory causes of a racially imbalanced workforce:

> To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical

> imbalances in the composition of their work forces."

Wards Cove, 490 U.S. at 657 (quoting Watson, 487 U.S. at 992).

To be sure, the circumstances presented by this case legitimately invite questions given the size of the minority population in Boston. However, as the Court in Watson and Wards Cove made abundantly clear, the issue for the courts is whether the EEOC answered those questions in its prima facie case with sufficient evidence to establish that the Union utilized a membership admissions practice that actually caused the exclusion of minorities from membership.

In the absence of a single charging party complaining of exclusion from membership, it was even more incumbent upon the EEOC to produce some other evidence that the Union somehow actually excluded minorities from membership. As noted above, the EEOC produced no such evidence. The court of appeals based its conclusion that the EEOC had made a prima facie case of causation in this case exclusively by reference to whom the Union included, and it ignored altogether from an evidentiary standpoint the question of whether and to what extent the Union ever actually excluded anyone -- the only proper focus of inquiry on the issue of causation in a disparate impact case under Title VII after Watson and Wards Cove.

Indeed, in view of this complete dearth of applicant data, the court of appeals based its conclusion that the Union had excluded minorities on nothing more than what it quite candidly characterized as "highly suggestive circumstances." (App. 21). This holding effectively repudiates the Court's standard of proof of causation in disparate impact cases, and inescapably implicates the concerns that initially prompted the Court to adopt its rigorous standard, namely, that employers and other Title VII defendants may be potentially liable for "the myriad of innocent causes" of statistical imbalances in a work force or organization membership.

Consequently, the court of appeals' holding in this case -- that causation may be established despite the absence of evidence of the exclusion of or even application by a single minority -- exposes small to moderate-sized, family-dominated employers as well as unions to liability based on nothing more than "suggestive circumstances." This is precisely the possibility the Court in Watson and Wards Cove sought to avoid, and is the reason why the writ should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

May 25, 1995

Respectfully submitted,

Thomas F. Birmingham
Christopher N. Souris
Counsel of Record
FEINBERG, CHARNAS & BIRMINGHAM
177 Milk Street
Boston, MA 02109
(617) 338-1976

Counsel for Petitioner Steamship Clerks Union, Local 1066

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UNITED STATES COURT OF APPEALS
For the First Circuit

No. 94-1621

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff, Appellee,

v.

STEAMSHIP CLERKS UNION, LOCAL 1066
Defendant, Appellant

No. 94-1656

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff, Appellant,

v.

STEAMSHIP CLERKS UNION, LOCAL 1066
Defendant, Appellee

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Richard G. Stearns, U.S. District Judge]

Before Selya, Boudin and Stahl, Circuit Judges.

APPENDIX 1

Christopher N. Souris, with whom Thomas F Birmingham and Feinberg, Charnas 7 Birmingham were o brief, for Local 1066.

Paul D. Remshaw, Attorney with whom james R. Neely Jr., Deputy General Counsel, Gwendolyn Young Reams Associated General Counsel, Vincent J. Bladewood, Assistanc General Counsel, and Lamont N. White, Attorney were o brief, for EEOC.

February 28, 1995

Selya, Circuit Judge. Labor unions have historicall been instruments of solidarity, forged in a ostensible effort t counterbalance the weight of concentrated industrial power. I is, therefore, ironic - but not unprecedentally so, inasmuch a "irony is no stranger to the law," Amanullah v. Nelson, 811 F.2 1, 17 (1st Cir. 1987) - that unions themselves sometimes engag in exclusionary membership practices. The court belo detected such an elitist strain in the operation of the Steamshi Clerks Union, Local 1066 (the Union), determining that th Union's policy requiring prospective members to be "sponsored by existing members - all of whom, from the time immemoria have been white - constituted race-based discrimination. Se EEOC v. Costello, 850 F. Supp. 74, 77 (D. Mass. 1994).

In this venue, the Union calumnizes both the district court's evaluation of the sponsorship practice and the court's remedial rulings. The Equal Employment Opportunity Commission (the EEOC), the plaintiff below, cross-appeals, likewise voicing dissatisfaction with the court's remedial rulings (albeit for very different reasons). Though we uphold the finding of disparate impact discrimination, we conclude that the lower court acted too rashly in fashioning remedies without pausing to solicit the parties views. Hence, we affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

The relevant facts are not disputed. The Union is "a labor organization engaged in an industry affecting commerce," 42 U.S.C. §2000e (d)-(e) (1988). It has approximately 124 members, 80 of whom are classified as active. The members serve as steamship clerks who, during the loading and unloading of vessels in the port of Boston, check cargo against inventory list provided by the shippers and consignees. The work is not taxing; it requires little in the way of particular skills.

On October 1, 1980, the Union formally adopted the membership sponsorship policy (the MSP) around which this suit revolves. The MSP provided that any applicant for membership in the Union (other than an injured longshoreman) had to be sponsored by an existing member in order for his application to be considered. The record reveals, without

contradiction, that (1) the Union had no African-American or Hispanic members when it adopted the MSP; (2) blacks and Hispanics constituted 8% to 27% of the relevant labor pool in the Boston area; (3) the Union welcomed at least 30 new members between 1980 and 1986, and then closed membership rolls; (4) all the "sponsored" applicants during this period and, hence, all new members, were Caucasian; and (5) every recruit was related to - usually the son or brother of - a Union member.

After conducting an investigation and instituting administrative proceedings, the EEOC brought suit on June 7, 1991, alleging that the Union had discriminated against African -Americans and Hispanics by means of the MSP.[1] The EEOC accused the Union of discrimination in violation of 42 U.S.C. §2000e-2(c).[2] In addition, the EEOC charged the Union had

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[1]The EEOC joined Bernard S. Costello, Inc. (Costello), a firm that regularly employed steamship clerks, as a codefendant. Costello is reportedly defunct, and, in any event, did not appeal from the entry of judgement below. Consequently, we treat the case as if the Union were the sole defendant.

[2]The statute provides in pertinent part:

> It shall be an unlawful employment practice for a labor organization...to exclude or expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin.

neglected to keep records (including so-called EEO-3 reports) in the manner required by law.[3]

After ample discovery, the EEOC moved for partial summary judgement, limiting its motion to the liability issues. The Union followed suit. On February 7, 1994, Judge Stearns held a hearing, reserved decision on the cross-motions, and extolled the virtues of settlement. Having planted the seed, the judge then provided an opportunity for the cultivation; he advised the parties that he would take no action for the time being an d instructed them that, should no settlement eventuate

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42 U.S.C. §2000e-2(c) (1) (1988). The district court found the Union to have practiced disparate impact discrimination in violation of this provision, and, therefore, did not consider the EEOC'S parallel charge of the intentional discrimination. See Costello, 850 F. Supp. at 76 n.5. We emulate the district court's example.

[3]The operative statute obligates covered labor organizations, inter alia, to:

(1) make and keep such record relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records..., and (3) make such records therefrom as the Commission shall prescribe by regulation or order...

42 U.S.C. §2000e-8(c).

within 30 days, he would thereafter render his decision. A month later, the Union informed Judge Stearns that the settlement discussions had been stalled. The EEOC, however, remained in a negotiating mode. On March 24, 1994, it mailed a letter to the court and the Union describing relief that it proposed for potential "inclusion in a consent decree."

On the very same date, the district judge, presumably unaware of the EEOC's letter, issued his decision. Judge Stearns granted the EEOC's motion for the partial summary judgement, holding that the MSP evinced unlawful discrimination on the basis of race. See Costello, 850 F. Supp. at 77-78. He also granted the Union's cross-motion for summary judgement on the record-keeping count.[4] See id.

Nothing significant occurred until April 10, 1994, when the court, without awaiting further motions or soliciting any input from the parties, entered final judgement. Among other things, it ordered the Union to (1) scrap the MSP; (2) open its membership "to enable admission of at least one new member who, since the books were closed in 1986, has died, retired or [become inactive]"; (3) submit a plan for publicizing membership opportunities, taking special cognizance of the need to recruit minority applicants; (4) periodically submit membership information to the EEOC; and (5) comply with the

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[4]The EEOC has not appealed from this portion of the judgement.

EEOC's record-keeping requirements, including the filing of EEO-3 reports. These appeals followed.

II. LIABILITY

We begin with the liability issue. The EEOC's allegations against the Union find their genesis in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. (1988). Broadly speaking, Title VII outlaws discrimination based on race, color, religion, gender, and national origin. In so doing, the law forbids both "overt discrimination" in the form of disparate treatment, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), and more subtle forms of discrimination, known as disparate impact discrimination, arising from "the consequences of employment practices, not simply the motivation." Id. at 432. In this instance, we limit our inquiry to whether the court below supportably determined that the MSP resulted in race-based disparate impact discrimination during the years 1980-1986.

A. THE DISPARATE IMPACT APPROACH

It has long been understood that discrimination, whether measured quantitatively or qualitatively, is not always a function of a pernicious motive or malign intent. Discrimination may also result from otherwise neutral policies and practices that, when actuated in real-life settings, operate to the distinct disadvantage of certain classes of individuals. See, EG., John Hart Ely, Democracy and Distrust 84 (1980) (observing that

technical enfranchisement, under certain conditions, has often fallen far short of actual enfranchisement). Within the world of Title VII, this understanding is reflected in the concept of disparate impact discrimination - a concept born of a perceived need to ensure that Title VII 's prescriptive sweep encompasses "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs, 401 U.S. at 431. Thus, the disparate impact approach roots out "employment polices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); accord Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (explaining that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination"). Beyond this abecedarian premise, however, the natural and allocation of the relevant burdens of proof must be clearly understood.[5]

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[5]The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), altered these burdens in some respects. See id., §105 (codified at 42 U.S.C. §2000e-2(k) (Supp. III 1991)) (specifically addressing the allocation and nature of burdens in disparate impact cases); see generally Rosemary Allito, Disparate Impact Discrimination Under the 1991 Civil Rights Act, 45 Rutgers L. Rev. 1011 (1983). Here, however, because the EEOC sued before the Act became law, the boggard of

Under the legal framework that applies in this case, see supra note 5, it is incumbent upon the plaintiff to demonstrate a prima facie case of discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Johnson v. Allyn &Bacon, Inc., 731 F.2d 64, 69 (1st Cir.), cert. denied, 469 U.S. 1018 (1984). In the disparate impact milieu, the prima facie cases consists of three elements: identification, impact, and causation. First, the plaintiff must identify the challenged employment practice or policy, and pinpoint the defendant's use of it. See Wards Cove Packing Co. v. Antonio, 490 U.S. 642,

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retroactive application hovers. See Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1519-20 (1994) (holding that §101 is nonretroactive); Landsgraf v. USI Film Prods., 114 S. Ct. 1483, 1508 (1994) (holding that §102 is nonretroactive); see also Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 932 (7th Cir.) (holding that the 1991 Act does not apply retroactively to a disparate impact claim), cert. denied, 113 S. Ct. 207 (1992). We need not probe this point, for, although the Union alluded to the 1991 Act in its appellate brief, neither party sought to invoke it either in the court below or on appeal. It is, therefore, not properly before us. See United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992); Clauson v. Smith, 823 F.2d 660, 666 (1st Cir. 1987) (collecting cases). Thus, our ensuing discussion reflects the legal framework as it exists without regard to the 1991 Act.

656 (1989).[6] Second, the plaintiff must demonstrate a disparate impact on a group characteristic, such as race, that falls within the protective ambit of Title VII. See generally id. at 650-55. Third, the plaintiff must demonstrate a casual relationship between the identified practice and the disparate impact. See id. at 656-657; Watson, 487 U.S. at 994.

When the plaintiff rests, declaring herself satisfied that she has established a prima facie case of disparate impact discrimination, the ball bounces into the defendant's court. At that point, the defendant has several options. First, it may attack the plaintiff's proof head-on, debunking its sufficiency or attempting to rebut it by adducing countervailing evidence addressed to one or more of the three constituent strands from which prima facie case is woven, see Dothard v. Rawlinson, 433 U.S. 321, 331 (1977), asserting, say, that no identifiable policy exists, or that the policy's implementation produces no disparate impact, or that the plaintiff's empirical claims - such as the claim of causation - are insupportable.

Alternatively, the defendant may confess and avoid, acknowledging the legal sufficiency of the prima facie case but endeavoring to show either that the challenged practice is job-

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[6]While Congress passed the 1991 Act partly in an effort to nullify certain aspects of the Court's opinion in Wards Cove, see Landsgraf v. USI Film Prods., 114 S. Ct. 1483, 1489 (1994), our reliance on Wards Cove is limited to portions of the opinion not affected by this legislative backlash.

related and consistent with business necessity, see Griggs, 401 U.S. at 431; see also Albemarle Paper, 422 U.S. at 425, or that it fits within one or more of the explicit statutory exceptions covering bona fide seniority systems, veterans' preferences, and the like.[7] See 42 U.S.C. §§ 2000e-2(h), 2000e-11; see also 1 Charles A. Sullivan et al., Employment Discrimination §§4.5-4.8 (2d ed. 1988). In all events, however, a defendant's good faith is not a defense to a disparate impact claim. See Griggs, 401 U.S. at 432 (holding that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

If the defendant falls in its efforts to counter the plaintiff's prima facie case, then the factfinder is entitled - though not necessarily compelled, cf. St Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2748-50 (1993) - to enter judgment for the plaintiff. See e.g., Cabrera v. Jakabovitz, 24 F.3d 372, 381 (2d Cir.), cert. denied, 115 S. Ct. 205 (1994). On the other hand, even if the defendant stalemates the prima facie case by elucidating a legitimate, nondiscriminatory rationale for utilizing the challenged practice, the plaintiff may still prevail if she is able to establish that the professed rationale is pretextual. See Wards Cove, 490 U.S. at 658-59; Johnson, 731 F. 2d at 69-70;

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[7]Because the Union has never suggested that the MSP comes within any such exception, we do not pursue this alternative.

see also McDonnell Douglas, 411 U.S. at 804. The plaintiff might demonstrate, for example, that some other practice, without a similarly undesirable side effect, was available and would have served the defendant's legitimate interest equally well. See Wards Cove, 490 U.S. at 660-61; Johnson, 731 F.2d at 69-71. Such an exhibition constitutes competent evidence that the defendant was using the interdicted practice "merely as a 'pretext' for discrimination." Albemarle Paper, 422 U.S. at 425 (quoting McDonnell Douglas, 411 U.S. at 804-05).

B. Standards of Review.

In general, summary judgement is proper only if, in the context of the motion and any opposition to it, no genuine issue of material fact exists and the movant has demonstrated its entitlement to judgement as a matter of law. See Fed. R, Civ. P. 56 (c); see also National Amusement, Inc. v. Town of Dedham, __ F.3d __, __ (1st Cir. 1995) [No. 94-1176, slip op. at 5]. Hence, "a party seeking summary judgement [must] make a preliminary showing that no genuine issue of material fact exists. Once the movant has made this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." National Amusements, __F.3d at__ [slip op. at 5]. An issue is "genuine" when the evidence relevant to it, "viewed in the light most flattering to the party opposing the motion, [is] sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." Id. at ___ [slip op. at 5-6] (citation

omitted). Since the summary judgement standard requires the trial court to make a legal determination rather than to engage in differential factfinding, appellate review is plenary. See Garside v. Osco Drug, Inc., 895 F.2d 46,48 (1st Cir. 1990).

Having recited the norm, we place it to one side, for certain unique aspects of the instant case dictate that we depart from the customary standard. The record discloses that, at the time the parties cross-moved for summary judgement, the Union voiced no disagreement with the facts on which the EEOC had constructed its case.[8] It gave no indication either that it intended to introduce any additional evidence or that any such evidence existed. To the exact contrary, the Union's contentions centered entirely around the ultimate legal significance to be accorded to conceded facts. In effect, then, the parties submitted their dispute to the district court as a case stated.

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[8]Of course, the mere fact that all parties move simultaneously for summary judgement neither unties the district court's hands nor renders the customary standard of review obsolete. Barring special circumstances, the nisi prius court must consider each motion separately, drawing inferences against each movant in turn, and the court of appeals must engage in de novo review. See El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 492 n.4 (1st Cir. 1992); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

Circuit precedent teaches that in such a situation - where, in a nonjury case, "the basic dispute between the parties concerns the factual inferences . . . that one might draw from the more basic facts to which the parties have drawn the court's attention," where "[t]here are no significant disagreements about those basic facts," and where neither party has "sought to introduce additional factual evidence or asked to present witnesses" - the district court is freed from the usual constraints that attend the adjudication of summary judgement motions. Federation de Empleados del Tribunal Gen. de Justicia v. Torres, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.). The court may then engage in a certain amount of differential factfinding, including the sifting of inferences. By the same token, the court of appeals may assume that "the parties considered the matter to have been submitted below as a case ready for decision on the merits." Id. Consequently, the standard for appellate oversight shifts from de novo review to clear-error review. See id. ("Under these circumstances . . . we should set aside the district court's factual inferences only if they are 'clearly erroneous.'"); see also United States v. Ven-Fuel, Inc., 758 F.2d 741, 744 n.1 (1st Cir. 1985) (stating in connection with a motion for summary judgement that when there are "no significant disagreements about the underlying facts, " and no indications that "any further factual evidence" might be available, the district court's factual inferences should be set aside "only if they are clearly erroneous") (citing other cases).

Based on these precedents, we are constrained to apply the more deferential clear-error standard when scrutinizing the inferences drawn by the court below.[9] Nonetheless, the court's legal conclusions engender plenary review. See McCarthy v. Azure, 22 F.3d 351, 354 (1st Cir. 1994).

C. Application of the Law

In this case, the district court adroitly applied the substantive law and concluded that the Union's sponsorship-based membership policy constituted disparate impact discrimination. See Costello, 850 F. Supp. at 77. We descry no error.

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[9]Our conclusion concerning the applicable standard of review is reinforced by the Union's brief on appeal. In it, the Union neither promotes the conventions of Rule 56 nor asserts that the district court should have left the matter for trial, but, rather, argues that the court entered judgement for the wrong party because the EEOC failed to present a prime facie case; and, alternatively, that even if a prima facie case emerged, the Union successfully rebutted it. This scenario not only is consistent with the submission of the matter as a case stated but also amounts to a waiver of any contrary contention. See United States v. Zannino, 895 U.S. 1, 17 (1st Cir.) (explaining that theories which are not briefed or argued are waived), cert. denied, 494 U.S. 1082 (1990).

1. The Prima Facie Case. We agree with the district court, see id. at 76-77, that the EEOC carried its burden of producing facts sufficient to limn the three elements essential to its prima facie case. The first element - identification - requires no elaboration.[10] We started, therefore, with the element of disparate impact and then move to causation. In both instances, the relevant facts are not disputed.

a.

Population statistics for the Boston area, proffered by the EEOC and unchallenged by the Union, show that the relevant time frame African-Americans comprised 21%, and Hispanics 6%, of the available labor force. Although there are no known statistics on the racial composition of the Steamship clerk industry - if such an "industry" exists - "Census Bureau statistics that merge the transportation employment industry's employment statistics with similar statistics for public utilities . . . show that blacks and Hispanic participate in the labor force as clerical/clerks at a rate of 7% and 1% of the total, respectively." Id. at 77 n.6. Despite the fact that the combined pool potential black and Hispanic applicants for union membership ranged between 8% and 27% of the overall pool of potential applicants, no African-American or Hispanic was

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[10]It is transparently clear that the EEOC singled out the MSP, identified it as the challenge employment practice, and linked it to the Union.

granted Union membership. Finally, during the MSP's heyday - the six-year period from 1980 through 1986 - the Union admitted 30 new members. Based on a comparison of these figures with the profile of the newly minted Union members - 0 of 30, or zero percent - the district court found that the EEOC adequately demonstrated a race-based disparate impact.

The Union is of more skeptical mind. Although it does not challenge either the accuracy or the relevance of the underlying data, it contends that the small sample size renders the figures statistically insignificant, thus undercutting the EEOC's attempt to establish a disparate impact. This contention is doubly flawed.

First, the contention misperceives the facts. While we appreciate that "small sample size may . . . detract from the value of [statistical] evidence," Teamsters, 431 U.S. at 339 n.20, a defendant who asserts that a plaintiff's prima facie case is insufficient must point out real deficiencies, not simply hurl epithets from behind gauzy generalizations. In particular, where, as here, a plaintiff has made out a colorable prima facie showing of discrimination, a challenger must do more than trumpet conclusory averments concerning the validity of the plaintiff's statistical foundation. See 1 Sullivan et al. supra, § 4.3.1, at 184 (explaining that a defendant must "attempt to undermine at least one element of the plaintiff's case by bringing forth sufficient evidence to create a question in fact on

that element") (emphasis supplied). In this case, the Union proffered no such evidence.

Second, the Union's contention misperceives the law. The cornerstone of its legal argument is our opinion in Fudge v. City of Prov. Fire Dep't, 766 F.2d 650 (1st Cir. 1985), and, yet, its point-by-point reliance on Fudge leaves much to be desired. While the Fudge court cautioned against the use of "an intuitive judicial judgment" as the sole basis for discerning a disparate impact, Judge Coffin carefully confined this admonition to cases "involving a claim that a screening test for admission to employment imposes a disparate and adverse impact" on a protected group. Id. at 657. Indeed, in a later case, not involving a screening test, we cited Fudge for the proposition that, in weighing the probative value of statistical evidence, "[e]ven small samples are not per se unacceptable." Freeman v. Package Mach. Co., 865 F.2d 1331, 1342 n.5 (1st Cir. 1988). So it is here: because the EEOC's claim does not involve an examination or other screening test, and because it nestles in a singularly compelling factual context, the Union's repeated references to Fudge shed far more heat than light.[11]

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[11] Furthermore, even if we were to overlook these important distinctions and apply Fudge wholesale to the case at hand, we would endorse the trial court's meticulous explanation of why a finding of disparate impact discrimination would still be appropriate. See Costello, 850 F. Supp. at 77 n.7.

The utility of statistical evidence "depends on all of the surrounding facts and circumstances." Teamsters, 431 U.S. at 340. In this instance, the sample, though small, is telling. Given the unique factual mosaic from which the statistical scaffolding hangs, and the logical force of the conclusion that the numbers suggest, it would blink reality to conclude that a serious "sample size" problem lurks here. In our judgment, the lower court did not err in considering the available statistical evidence, and drawing founded inferences from it, en route to a disparate impact determination. See, e.g., United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.) ("On the basis that a showing of an absence or a small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination, the burden of going forward . . . is shifted to the accused, for such a showing is enough to establish a prima facie case."), cert. denied, 404 U.S. 984 (1971); accord United States v. United Bhd. of Carpenters & Joiners, 457 F.2d 210, 214 (7th Cir.), cert. denied, 409 U.S. 851 (1972).

b.

Reluctant to raise a white flag, the Union further contends that, even if the EEOC established a significant racial disparity, its prima facie case misfired on the element of causation. The district court rejected this analysis. After reviewing the MSP and the evidence of disparate racial impact,

it concluded that the former had caused the latter. See Costello, 850 F. Supp. at 77 ("Chance is not a likely explanation for this result."). The pertinent question on review is whether the court erred in finding causation. We think not.

On this issue, the Union suggest three reasons why the court blundered, asseverating that the EEOC (1) did not identify particular African-Americans or Hispanics who unsuccessfully sought Union membership; (2) confused nepotism with race-based discrimination; and (3) failed to offer a suitably sophisticated statistical analysis, beyond a mere presentation of accumulated data. In the argot of the port, none of these arguments holds water.

As for the absence of identifiable minority applicants, the Union would have us rule that causation may be proven only by demonstrating that a flesh-and-blood African-American or Hispanic, who applied and was turned away, would have been admitted as a member but for the MSP. This isthmian view is a product of tunnel vision. The concept of causation until Title VII, like the larger concept of discrimination itself, is sometimes only discernible and inferable when viewed in context. See, e.g., Julia C. Lamber et al., The Relevance of Statistics to Prove Discrimination: A Typology, 34 Hastings L.J. 553, 553 (1983) ("Discrimination is difficult to define, observe, and prove . . . . [I]t may have no intrinsic meaning at all; rather, it acquires meaning in the context of a larger whole."); see also Teamsters, 431 U.S. at 340 (explaining that the value of

statistical data depends on the totality of the surrounding circumstances). Here, the unvarnished reality of the situation - a sponsorship-based membership policy, enacted by an all-white union, and a six-year track record of zero minority members despite 30 new white members, all of whom had family ties to existing members - renders the district court's conclusion irresistible notwithstanding the lack of a specific unsuccessful minority applicant.[12]

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[12]None of the three cases brandished by the Union is to the contrary. Two of them - Johnson v. Uncle Ben's Inc., 965 F.2d. 1363 (5th Cir. 1992), cert. denied, 114 S. Ct. 1641 (1994), and Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990) - are reminiscent of Fudge inasmuch as both involved challenges to an employment-related testing practice, such as an examination, that had no inherently obvious tendency to discriminate against protected classes of individuals. Here, by contrast, we are dealing with a union consisting exclusively of whites which only accepts applicants who have already been sponsored by a member. Under such highly suggestive circumstances, far less additional proof is necessary to establish causation. Similarly, in EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991), the court rejected the EEOC's theory of causation because its statistical analysis totally omitted several key explanatory variables, thereby potentially skewing the results. See id. at 301. Here, by contrast, there is nothing to indicate any omitted variable or to cast doubt upon the apparent outcome.

If bolstering is needed - and we do not believe that it is - we would add only that the cases and the commentators teach that evidence involving the rejection of actual applicants is not always necessary to prove causation. See, e.g., United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36, 416 F.2d 123, 127 (8th Cir. 1969) (holding, in an intentional discrimination case, that it was not "necessary for the government to prove that the Locals have refused membership" to actual black applicants); 1 Sullivan et al., supra, § 4.3.1, at 186 (enunciating similar view). The Court's opinion in Dothard bears stout witness to this principle. There, the plaintiff alleged that Alabama's height and weight requirements for correctional counselors had a disparate impact on female applicants. In upholding the challenge, the Justices explicitly disavowed any rule "that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants." Dothard, 433 U.S. at 330 (citing Griggs, 401 U.S. at 430). In a passage that has marked relevance to the instant case, the Court reasoned that "[t]he application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." Id. In this case, as in Dothard, we think that the court below could have inferred causation, despite the dearth of actual applicants, in part because the MSP would itself naturally have discouraged potential minority candidates.

The Union's second asseveration need not detain us. Although the district court did not find a formal policy of nepotism, it recognized, as any thinking person must, that the MSP appeared to operate nepotistically. See Costello, 850 F. Supp. at 76 n.4. The Union claims that this recognition betokens a confusion of two separate concepts: nepotism and discrimination. We do not agree. The history of the MSP's actual implementation - an archive which reveals that every new member has been a relative of an existing member - is competent evidence on the element of causation. See Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990) (explaining that "when the work force is predominantly white, nepotism and similar practices which operate to exclude outsiders may discriminate against minorities as effectively as any intentionally discriminatory policy").

In mounting its third asseveration, the Union once again eschews any challenges to the EEOC's basic data - the percentages of blacks and Hispanics in the relevant labor populations, as compared with the percentage of blacks and Hispanics on the Union's membership roster - but, rather, impugns the EEOC's failure to subject these proportionality data to some kind of formal statistical analysis. Although the Union's frustration is understandable, its position that a prima facie case of disparate impact discrimination must invariably include a formal statistical analysis is untenable.

We say that the Union's frustration is understandable because it would almost certainly have been helpful to the parties and to the court if the EEOC had processed its data in a slightly more sophisticated manner. Moreover, given its resources and institutional experience, the EEOC has no easily ascertainable excuse for neglecting this avenue. Nonetheless, though one would normally expect sound statistical analyses to assist a plaintiff in making out a prima facie case, see Lamber et al., supra, at 584-95, the absence of such analyses, by itself, does not automatically doom the plaintiff's efforts. See, e.g., Ingram v. Madison Square Garden Ctr., Inc., 709 F.2d 807, 810-11 (2d Cir.) (affirming determination of Union's liability under Title VII despite weak statistical evidence), cert. denied, 464 U.S. 937 (1983). To hold otherwise would effectively subordinate the whole Title VII, in every last disparate impact case, to the sometimes vagarious sway of statistical proof.

In sum, it was not error for the lower court to conclude, on the idiosyncratic facts of this case, that the MSP, though neutral on its face, proximately caused the exclusion of minorities between 1980 and 1986.[13]

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[13] We add on further note. Though it is perhaps true, as the Union claims, that no court has ever invalidated a facially valid sponsorship-based membership policy under Title VII, it seems equally true that no such policy has ever been upheld. It would be a peculiar rule of construction if a statue could not be applied in a certain manner unless it had already been applied in that manner in a previous case.

2. The Union's Response. Once the EEOC demonstrated a prima facie case of discrimination, the burden or production shifted. In the absence of any applicable statutory exemption, see supra note 7, it because incumbent upon the Union either to mount a satisfactory empirical rebuttal or to show that the challenged practice was job-related and consistent with business necessity. For all intents and purposes, the Union travels only the second path. Its sojourn is unavailing.

The Union suggested that the MSP is job-related and consistent with business necessary because it represents an important vehicle for continuing family traditions. Most of the 30 new members, according to the Union, "joined simply because their fathers had been members and because they wanted to maintain a family tradition...." We approach the task of evaluating this rationale mindful that the meaning and scope of the "business necessity" concept are blurred at the edges.[14] See 1 Sullivan et al., supra, §4.3.2. In the case at bar, however, such potential indeterminacy is of no consequence, for the

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[14] The 1991 Act did little to sharpen the focus. See Note, The Civil Rights Act of 1991: The Business Necessity Standard, 106 Harv. L. Rev. 896, 903-06 (1993) ("On the issue of business necessary, the Act merely returns the courts to where they were just prior to Wards Cove, and appears to provide little guidance as to what direction they should take from there. The courts are saddles, instead, with a rich but uncertain legislative history arising from two years of complicated political maneuvering.")

Union's "family tradition" thesis falls hopelessly short of limning a business necessity, and thus, does not require us to explore terra incognita.

We will not tarry. Here, the Union has not shown even the glimmerings of a business necessary defense. Instead, it asks us to undertake a leap of faith. It makes absolutely no effort to explain, logically, why family tradition, and, thus, the MSP, are necessary adjuncts to carrying on the business of steamship clerks; and we, like the district court, can discern no essential connection. See Costello, 850 F. Supp at 77 (concluding that the Union's justification "does not explain, much less justify, the nexus between family tradition and the job of steamship clerk,' but "is merely an illumination of the motives of those who have had its advantage"). If courts were to accept an employer's arbitrary ipse dixis as a satisfactory justification for retaining a policy that produces an invidiously discriminatory impact, Title VII would be reduced to no more than a toothless tiger. A policy that is neutral on its face, but that discriminates in fact, cannot elude the proscriptions of the law merely because its sponsor prefers to retain it.[15] See

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[15] The Union attempts to profit from the "family tradition" gambit in another way as well. Though offering no empirical rebuttal to the EEOC's prima facie case, the Union posits that no African-Americans or Hispanics joined between 1980 and 1986 because of "the stark economic reality" of membership dues and the lack of any guaranteed employment. It then seeks to explain the 30 new recruits on the basis of family tradition.

Wards Cove, 490 U.S. at 659 (warning that courts must not "permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices").

The finish line looms. Because the Union neither rebutted the EEOC's prima facie case nor articulated a legitimate, non discriminatory justification for its members policy, we uphold the grant of partial summary judgment in the EEOC's favor.

III. RELIEF

The remedial rulings rest on a less even keel. Although the EEOC restricted its Rule 56 motion to the issue of liability, the district court, shortly after granting the motion, entered a judgment that awarded several items of permanent equitable relief. See supra p. 5. The court acted entirely on its own initiative, without convening a hearing and without affording the litigants any warning that it intended to resolve the matter of remediation.

Although this trist, if believed, might conceivably furnish an alternative theory of causation, it is unsupported by any cogent evidence, and, in all events, did not foreclose the district court from making a contrary, inference-based determination of causation.

Both parties appeal from this aspect of the judgment. The Union attacks on two fronts, assailing the district court for proceeding too fast and for venturing too far. In the first place, the Union asserts that the court flouted due process by vaulting to the remedial stage without first putting the litigants on notice of its intentions and giving them an opportunity to be heard. In the second place, the Union denounces certain components of the injunction, especially the court's command that the membership rolls be reopened. The EEOC, for its part, castigates the court for not proceeding far enough; its says that backpay and mandated preferences to encourage minority membership should have been included in the compendium of relief.

Judicial dispensation of equitable remedies usually is reviewed for abuse of discretion. See Rosario-Torres v. Herandez-Colon, 889 F.2d 314, 323 (1st Cir. 1989) (en banc). Here, however, we need not consider the propriety of the remedies bestowed or withheld, for the district court's failure to provide notice taints its remedial rulings and necessitates vacating virtually the entire relief-related portion of the judgment.[16]

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[16] Of course, the district court plainly possessed the authority, without further proceedings, to order the Union to cease using the MSP. This portion of the decree may stand because using the MSP. This portion of the decree may stand because it flows ineluctably form the court's finding of disparate impact discrimination. Hence, our comments and our

The question of whether notice is required is a question of law and its, therefore, subject to plenary review. See McCarthy, 22 F.3d at 354. We are in full agreement with the Second Circuit that "[n]o principle is more fundamental to our system of judicial administration than that person is entitled to notice before adverse judicial action is taken against him." Lugo v. Keane, 15 F.3d 29, 30 (2d Cir. 1994). Examples abound. We, ourselves, have had occasion to address issues involving notice and its faithful companion, the opportunity to be heard, in a variety of contexts. See, e.g., Foster-Miller, Inc. v. Babcock & Wilcox Can., ___ F.3d ____, ___, (1st Cir. 1995) [No. 94-1498, slip op. at 21] (cautioning that, preparatory to deciding important issues, judges should strive to see that parties are given adequate notice and meaningful opportunities to be heard). We offer two illustrations.

First, while we have acknowledged that district courts possess the raw power to enter summary judgment sua sponte, we have repeatedly cautioned that this power must be "tempered by the need to ensure that the parties are given adequate notice to bring forward their evidence." Stella v. Town of Tewksbury, 4 F.3d 53, 55 (1st Cir. 1993); accord Jardines Bacata, Ltd. v. Diaz-Marquez, 878 F.2d 1555, 1560-61 (1st Cir. 1989); Bonilla v. Nazario, 843 F.2d 34, 37 (1st Cir. 1988). A second, very recent, example of our adherence to this

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instructions for vacatur are confined to the remainder of the equitable relief ordered sua sponte by the trial court.

principle can be found in Banks v. Shalala, ___ F.3d ___ (1st Cir. 1994) [No. 94-1653]. There, we vacated the district court's denial of Social Security disability benefits, not on the merits but because "the district court issued its affirmance [of the Secretary's decision] before affording [the adversely affected party] an opportunity to submit written argument explaining his objections to the Secretary's determination...." Id. at ____ [slip op at 2]. In taking that tack, we relied upon, and expressed our agreement with, the Fifth Circuit's statement "that 'district courts reviewing disability determinations should not conclude their review without an appropriate opportunity for the presentation of the parties' contentions.'" Id. at __ [slip op. at 6] (quoting Flores v. Heckler, 755 F.2d 401, 403 (5th Cir. 1985)).

The same principles also apply to and inform the dispensing of most types of equitable remedies.[17] Thus, absent exigent or other extraordinary circumstances - and there are none reflected in this record - a court generally may not award

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[17] We exempt from this discussion provisional remedies, such as temporary restraining orders and ex parte attachments, which may from time to time be justified to preserve the status quo in a given case despite the absence of either notice or a predeprivation hearing. See e.g., Fed. R. Civ. P. 65(b); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968) (recognizing that "[t]here is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration").

equitable relief without first providing all affected parties actual notice that it is contemplating remedial action and affording them a meaningful chance to be heard. Nor does the fact that the judge enjoys broad discretion in shaping solutions relieve him from the obligation to afford procedural due process to all parties in interest. The rights of due process are constitutional and inviolable; hence, once a district court chooses to exercise its discretion, its conduct must comport with the promise of the Constitution. Discretion ensures the judge's right to chose rather freely among plausible remedial option; it does not insulate him from listening to - or, at least, reading - the parties' importuning.

We hold, therefore, that under ordinary circumstances litigants must be accorded fair opportunities to submit proposals for the judge's consideration and to offer arguments in support of their positions before an award of equitable relief is made. We caution, however, that due process does not necessarily require any particular kind of hearing. See, e.g., In re Nineteen Appeals, 982 F.2d 603, 611 (1st Cir. 1992) (noting that "in many, if not most, instances, due process does not require a full-scale trial, or even a hearing strictly conforming to the rules of evidence"); Domegan v. Fair, 859 F.2d 1059, 1065 (1st Cir. 1988) (discussing district court's discretion to bypass oral argument); see generally Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (explaining that due process is a mailable concept, calling "for such procedural protections as the particular situation demands"). Accordingly, many matters can lawfully -

and satisfactorily - be heard on the papers. See Aoude v. Mobil Oil Corp., 862 F. 2d 890, 894 (1st Cir. 1988); Cia. Petrolera Caribe, Inc. v. Arco Caribbean Inc., 754 F.2d 404, 411 (1st Cir. 1985).

In the last analysis, whether any particular proceeding within any specific case warrants live arguments before the judge, as opposed to some other approach, is simply a function of the characteristics of the situation. "The test should be substantive: given the nature and circumstances of the case, did the parties have a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions?" Aoude, 862 F.2d at 894. In connection with this inquiry, one must bear in mind that litigants have no absolute right to present their arguments in whatever way they may prefer, or to expostulate for as long as they may choose. The inmates do not run the asylum. Thus, the trial judge has broad authority to place reasonable limits on the parties' presentation of their positions. See, e.g., United States v. Gleeson, 411 F.2d 1091, 1096 (10th Cir. 1969).

This case however, is about complete deprivation rather than the reasonableness of limits. The Union received no notice that the court had begun to mull proposed remedial rulings. And all available indications were to the contrary: the EEOC's motion for partial summary judgment, by its own terms, was "confined to questions of liability only and [did] not address relief"; the district court had not hinted at the hearing

on the cross-motions for summary judgment that it intended to exceed the scope of the EEOC's motion;[18] and the district court's March 24 rescript sounded no warning bells. The Union, then, had no reason to marshal its arguments on relief-related issues, and no opportunity to make its case to the decisionmaker. Viewed in that light, the remedial rulings cannot endure.[19]

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[18] Indeed, the trial court stated then that the case was "not yet at the remedy stage." In its rescript of March 24, 1994, the court noted explicitly that "[t]he EEOC is seeking a determination as to liability. It has not as yet suggested an appropriate remedy." Costello, 850 F. Supp. at 75 n.2.

[19] In a vain attempt to salvage the court's remedial rulings, the EEOC speculates that the Union was on constructive notice because the EEOC had requested injunctive relief in its complaint. Relatedly, it theorizes that a hearing was unnecessary because, no matter what the Union's input, injunctive relief was warranted. These arguments are jejune, and we reject them out of hand. The EEOC's insistence that its transmittal of March 24 placed the Union on notice that the court was pondering remediation is equally meritless. There is nothing about the EEOC's discussion of possible anodynes in the context of a proposed consent decree that would have altered the most vigilant litigant to array its relief-related arguments, or risk preclusion.

IV. CONCLUSION

Our voyage is nearly complete. Having navigated the waters of Title VII, we now steer this case into the port of judgment and unload the cargo we have hauled. We affirm the district court's grant of partial summary judgment in favor of the EEOC on its claim of disparate impact discrimination. The Union adopted a membership policy which, by its very nature, created a strong likelihood that no non-white face would ever appear in the Union's ranks. Based on the evidence we have recounted, the EEOC established a prima facie case of discrimination. Because the Union failed either to rebut that case or to offer a legitimate, nondiscriminatory justification for maintaining the membership policy, the district court did not err in finding for the EEOC in respect to liability.

The court's remedial rulings float in more turbulent seas. We agree with the Union that the district court's gadarene rush to judgment deprive its of any meaningful opportunity to propose appropriate remedies or otherwise to participate in the formulation of a decree. Hence, we vacate the remedial rulings (save only for the exception previously mentioned, see supra note 16) and remand for further proceedings.[20] In so doing, we take no view as to what forms of relief, apart from barring

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[20] Notwithstanding the foregoing, the unappealed judgment in the Union's favor on the record-keeping count, see supra note 4 and accompanying text, endures.

continued use of the MSP itself, would, or would not, appear proper; and we specifically decline to address the parties' substantive concerns as to the remedies granted and withheld.

Affirmed in part, vacated in part, and remanded. Costs in favor of plaintiff.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 91-11572-RGS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

BERNARD S. COSTELLO and
STEAMSHIP CLERKS UNION, LOCAL 1066

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MARCH 24, 1994

STEARNS, D.J.

The Equal Employment Opportunity Commission (EEOC) brought this Complaint[21] alleging that Bernard S. Costello, Inc. (Costello) and Steamship Clerks Union, Local 1066 (Local 1066) violated Title VII of the Civil Rights Act by discriminating against blacks and Hispanics on the basis of race and national origin in the hiring of Steamship Clerks. Costello ceased doing business in 1990. Prior to that, Costello was engaged in stevedoring operations in the Port of Boston and was a member of the Boston Shipping Association. The Association has a collective bargaining agreement with Local 1066 under which Local 1066 refer steamship clerks for employment to Association members.

The EEOC claims that Local 1066 discriminated by adhering to a membership policy that required new union members to be sponsored by an existing member. The members typically sponsored only family members. The entire membership of Local 1066 is white. The EEOC further alleges that Costello discriminated by relying solely on referrals from Local 1066 which Costello knew or should have known excluded blacks and Hispanics from membership.

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[21] As permitted by Section 706(b) of Title VII, 42 U.S.C. §2000e-5(b), a Commissioner of the EEOC originally filed a charge of discrimination with the EEOC regarding the allegations set out in the Complaint.

This matter is before the court on the EEOC's motion for partial summary judgment[22] and Local 1066's cross motion for summary judgment Costello did not file an opposition to the EEOC's motion or statement of undisputed facts. For the following reasons, the EEOC's motion is ALLOWED in part and Local 1066's motion is ALLOWED in part.

FACTS

The material facts seen in the light most favorable to the defendants are as follows.

The job of steamship clerk entails the checking of cargo against lists provided by shipping companies and consignees during the loading and unloading of cargo vessels. The work requires an ability to read and write and to do simple arithmetic.

From October 1, 1980, until June 30, 1990, Costello conducted stevedoring operations at Moran Terminal, Charlestown. Until June 30, 1990, Costello regularly employed more than 15 employees, including steamship clerks. Costello never hired a black or Hispanic clerk.

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[22] The EEOC is seeking a determination as to liability. It has not yet suggested an appropriate remedy.

From October 1, 1980, until June 30, 1990 Costello was a member of the Boston Shipping Association. As such, Costello conducted its stevedoring operations in accord with a series of collective bargaining agreements between the Boston Shipping Association and Local 1066. Pursuant to the agreements, Costello hired steamship clerks through a hiring hall maintained by Local 1066. As a member of the Association, Costello agreed not to hire non-union clerks to do steamship work unless Local 1066 failed to supply a sufficient number of qualified personnel. As a consequence, Costello rarely hired non-members of Local 1066.

Local 1066 is a local labor organization affecting commerce. The Union has 124 members. There are eighty active members. From October 1, 1980, until up to the time the lawsuit was filed,[23] Local 1066 had a policy requiring that applicants seeking admission (other than injured longshoremen) be sponsored by a member of the union.[24] The sponsored

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[23] Although the union closed its membership books in 1986, the policy remained in effect.

[24] A review of the record shows that this fact is not in dispute despite defendants' contention otherwise. Defendant relies on the deposition of Thomas Fitzgerald, the union's business agent for the proposition that not all union members were sponsored by a family member. Mr. Fitzgerald's deposition testimony, however, shows that in all cases, except one, where he knew how a member had entered the union, it was by family sponsorship. The one exception was the result of

applicants were always members' relatives. Local 1066 has no black or Hispanic members and has never had a black or Hispanic sponsored for membership. No black or Hispanic has even been formally denied admission to Local 1066 or formally denied the opportunity to work as a steamship clerk in the Port of Boston.

DISCUSSION

Summary judgment is appropriate when, based upon pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact and [where] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Gaskell v. Harvard Co-op Society, 3 F.3d 495, 497, (1st Cir. 1993). Under the evidentiary framework first developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the plaintiff has the burden of presenting a prima facie case of discrimination. If accomplished, the burden shifts to the defendants to articulate a legitimate nondiscriminatory reason for their actions.

The EEOC alleges in its Complaint that Local 1066 unlawfully restricted its membership on the basis of race by requiring that members be referred by an already admitted union member. The EEOC argues that this policy of membership referral created a disparate and adverse impact on

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a previous lawsuit brought under Title VII alleging gender discrimination.

blacks and Hispanics.[25] In a disparate impact case, the plaintiff must show that "facially neutral employment practice ha[s] a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination." Connecticut v. Teal, 457 U.S. 440, 446-47 (1982), quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). If the defendant does not meet its burden of articulation, the court should find in favor of the plaintiff.

As evidence of adverse impact, the EEOC relies on the fact that statistically no black or Hispanic has ever been made a member of Local 1066. In Fudge v. City of Providence Fire Dept., 766 F.2d 650, 658 (1st Cir. 1985), the First Circuit addressed the issue of statistical evidence in an adverse impact case involving admission tests to a fire fighters' training academy. The test articulated in Fudge is applicable to the instant case.

> [In] cases involving a narrow data base, the better approach is for the courts to require a showing that the disparity is statistically significant, or unlikely to have occurred by chance, applying

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[25] The EEOC also argues that the union's membership policy is a *per se* violation of Title VII. Because I find that the union's policies created an adverse impact, I do not address this issue.

> basic statistical tests as the method of proof.... When statistical tests sufficiently diminish chance as a likely explanation, it can be presumed that an apparently substantial difference in pass rates is attributable to discriminatory bias, thus shifting the burden to defendants to show job relatedness. If the probability is sufficiently high that the disparity resulted from chance, the plaintiff must present additional evidence of disproportionate impact in order to establish a prima facie case. The test for chance would determine the competency and validity of exclusively statistical proof in a far more reliable manner than wholly intuitive response. [citations omitted.]

Id.

Prior training or specialized skills are not required to perform steamship clerk tasks. As the EEOC pointed out in its Decision after the investigation of the charge, the general population statistics for the relevant Boston area labor market show that blacks comprise 21% of the available labor force and Hispanics 6%.[26] Statistically, the union's membership referral policy has never produced black or Hispanic member. Chance

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[26] Specific statistics on the racial composition of the steamship clerk industry are not available. There are, however, Census Bureau statistics that merge the transportation industry's employment statistics with similar statistics for public utilities. These show that blacks and Hispanics participate in the labor force as clerical/clerks at a rate of 7% and 1% of the total, respectively.

is not a likely explanation for this result.[27] Plaintiff, therefore, has carried its burden of presenting a prima facie case of discrimination against the union. The burden thus shifts to Local 1066 to justify its employment practices. "The explanation defendant provides must be 'clear and reasonably specific'.... [The] defendant must offer more than vague, general averments of good faith." Oliver v. Digital Equipment Corp., 846 F.2d 102, 109 (1st Cir. 1988), [citations omitted]. Local 1066, however, has failed to articulate a job related rationale for its membership policy. The purported justification offered by the Union is that "[m]ost recently inducted members have joined the [u]nion for non-economic reasons such as continuing a family tradition of membership." This statement is not a rationale for the policy. It is merely an illumination of

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[27] In the Fudge case, the plaintiff failed to carry its burden of presenting a prima facie case. The court noted that the plaintiff had failed to submit expert opinion or request judicial notice of written sources to help delineate the role of chance in the statistical proof. In the instance case, this information does not seem necessary. Unlike the Fudge statistics, the plaintiff's data is straightforward. For all of the years in question, no blacks or Hispanics were ever admitted. Moreover, only one referral policy is at issue, unlike Fudge where different tests generated different employment statistics. "In any event, fine tuning of statistics" cannot obscure "the glaring absence of minorit[ies].... The [defendants'] inability to rebut the inference of discrimination [is] not from a misuse of statistics but from "the inexorable zero." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977).

the motives of those who have had its advantage. It does not explain, much less justify, the nexus between family tradition and the job of steamship clerk, or the union's motivation in attempting to perpetuate that connection. Even if it did, "Title VII case law has from the beginning made clear that nepotistic concerns cannot supersede the nation's paramount goal of economic opportunity for all." Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303 (9th Cir. 1982).

Inasmuch as defendants have failed to rebut the EEOC's prima facie case of discrimination, the plaintiff is entitled to summary judgment in its favor as to claims alleging that Local 1066 violated Title VII by discriminating on the basis of race and national origin.

In its Complaint, the EEOC also alleged that Local 1066 violated Title VII by failing to make and keep records and file EEO-3 reports as required by Section 709(c) of Title VII, 42 U.S.C. §2000e-8(c). The EEOC, however, has not produced any material facts to support this claim.[28] Therefore, Local 1066 is entitled to summary judgment in its favor as to these allegations.

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[28] The EEOC did submit facts to support these allegations based on Requests for Admissions to the union that the EEOC sought to have deemed admitted pursuant to Fed. R. Civ. 36(a). Because the court subsequently allowed the union to file its responses late, these facts can no longer be treated as admitted.

The EEOC also alleges that Costello violated Title VII by relying solely on referrals from Local 1066 for steamship clerks when Costello knew or should have known that the union excluded blacks or Hispanics from membership. An employer discriminates if it obtains workers solely from a referral system that excludes members of minority groups. United States v. Georgia Power, 474 F.2d 906, 925-26 (5th Cir. 1973). "An employer union agreement permitted the employer to discriminate is not defense." Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2nd Cir. 1980). Costello has admitted that it relied on Local 1066 to refer steamship clerks for employment and that it has never employed a black or Hispanic as steamship clerk. The EEOC has carried its burden of proving a prima facie case of discrimination. Costello has not offered a defense. Consequently, the EEOC is entitled to summary judgment in its favor as to the claims in the Complaint alleging that Costello violated Title VII.

ORDER

For the foregoing reasons, the EEOC's motion for partial summary judgment is ALLOWED as to so much of the Complaint as alleges that Local 1066 and Costello violated Title VII by discriminating on the basis of race and national origin. Local 1066's motion for summary judgment is ALLOWED as to those claims alleging that Local 1066 violated Title VII by filing to file EEO-3 reports.

SO ORDERED

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 91-11572-RGS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

BERNARD S. COSTELLO and
STEAMSHIP CLERKS UNION, LOCAL 1066

APRIL 10, 1994

JUDGMENT

STEARNS, D.J.

Consistent with this court's Memorandum and Order of March 24, 1994 JUDGMENT shall enter as follows:

(1) Local 1066 will discontinue its practice of restricting admissions to individuals sponsored by relatives or acquaintances already admitted to membership. Local 1066 shall further refrain from discrimination based on race or

national origin in admitting persons to its membership or in referring members for employment as steamship clerks.

(2) Local 1066 will open its books to enable admission of at least one new member for each listed member who, since the books were closed in 1986, has died, retired or ceased altogether to accept employment as a steamship clerk.

(3) Within 60 days of the date of entry of this judgment and prior to enrolling such new members, Local 1066 shall submit for the comment of the EEOC and the approval of the court a plan for publicizing in the Boston metropolitan area the opening of Local 1066's membership books to interested persons, including minority applicants.

(4) Local 1066 will comply with all the Equal Employment Opportunity Commission's (EEOC) regulations as to record keeping, including filing of EEO-3 reports.

(5) Local 1066 will identify the EEOC, on a yearly basis, all active members working as steamship clerks, whether regularly or occasionally employed, and all active members eligible to receive Guaranteed Annual Income, i.e. payment under a program providing to certain clerks payment at base rate for 1600 hours per year, whether or not worked.

(6) In referring steamship clerks for employment and in computing seniority and eligibility for Guaranteed Annual

Income, Local 1066 will refrain from discrimination based on race or national origin.

(7) Bernard S. Costello, Inc. will refrain from discrimination based on race or national origin in any further dealings involving the employment of steamship clerks in the Port of Boston.

SO ORDERED

29 U.S.C. §2000e-2 Unlawful employment practices

(a) Employer practices

It shall be unlawful employment for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for memberships or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor-organization or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment

in, any program established to provide apprenticeship or other training.

* * *

(k) Disparate impact as basis of practice

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if --

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refused to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrated to the court that the elements of a respondent's

decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzes as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989 with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. §802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful

employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.